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PUBLIC PROSECUTOR

v.

HASSIM BIN JONET

HIGH COURT MALAYA, IPOH

TUAN KANG HWEE GEE JC

b

[CRIMINAL TRIAL NO. 58-5-1992]

15 DECEMBER 1994

c

CRIMINAL LAW: *Dangerous drugs - Trafficking - Control and custody - Knowledge - Drugs in laundry bag under clothing - Carried on motorcycle - Denial of knowledge that bag contained cannabis - Facts and circumstances indicating knowledge - Sections 2 and 39(B) Dangerous Drugs Act 1952.*

EVIDENCE: *Presumptions of possession under s. 37(d) and of trafficking under s. 37(da) - Whether both sufficiently rebutted - Separate consideration for each - Sections 37(d) and 37(da) Dangerous Drugs Act 1952.*

d

CRIMINAL PROCEDURE: *Sentencing - Deterrence - Whether evidence indicates accused user or trafficker - Section 39A(2)(f) Dangerous Drugs Act 1952.*

e

The accused was ambushed and arrested with a laundry bag carried on his motorcycle. The top of the bag contained some men's clothing and below the clothing were plastic bags containing newspaper packages of 1,000 paper rolls of cannabis with a total weight 274.04 grammes. He was charged for trafficking under s. 39(B) of the Dangerous Drugs Act 1952 and upon his defence being called the accused denied knowledge that the bag contained drugs. He claimed that the bag was given by his housemate to be delivered to another acquaintance working at the Turf Club. He had obliged without enquiring what the plastic bag contained. He claimed that he only realised that the bag contained drugs when the raiding police officer examined the contents of the bags.

Held:

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[1] On the maximum evaluation test, the presumption under s. 37(da) (vi) Dangerous Drugs Act 1952 applied as the weight of cannabis was more than 200 grammes and the accused's defence was called. It is incumbent upon the Court, to consider whether on a balance of probability the defence has rebutted the statutory presumption of trafficking under s. 37(da) as a separate exercise even though the presumption of possession under s. 37(d) has not been rebutted.

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[2] Looking at the contemporaneous statements of the accused and the surrounding circumstances of the actual physical custody and control of drugs, the accused failed to rebut the presumption of possession and knowledge under s. 37(d).

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[3] However considering that the prosecution did not produce evidence of how, where and from whom the cannabis was procured, evidence needed to rebut the presumption of trafficking would be very minimal. On the evidence viewed objectively and in totality, the accused had rebutted the presumption of trafficking and also succeeded in raising a reasonable doubt that he was trafficking. He is guilty of possession under s. 39A(2) of the Act.

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[4] Public interest which stresses on deterrence should be the overriding consideration in all dangerous drugs cases where the drugs found on the accused is of such an amount that indicates he is not a user but a pusher or trafficker. It is only in cases where it is clear that he is a user, and therefore a victim, that the Court should consider a more lenient approach

with the objective of rehabilitation in mind. In this case the accused was in possession of such a large amount of drugs that he was unlikely to be a mere user. Taking into consideration the seriousness of the offence and the amount of cannabis, an appropriate sentence would be 15 years imprisonment with 12 strokes of the rotan, effective from the date of arrest.

[Accused found guilty of possession of dangerous drugs, convicted and sentenced accordingly]

Cases referred to:

Leong Boon Huat v. P.P. [1993] 3 MLJ 11 (*refd*)

Munusamy v. P.P. [1987] 1 MLJ 496 (*fol*)

Teh Geok Hock v. PP [1989] 3 MLJ 162 (*refd*)

Mohd. Radhi Yaacob v. Public Prosecutor [1991] 3 MLJ 169 (*fol*)

Public Prosecutor v. Badrulsham bin Bahrom [1988] 2 MLJ 585 (*fol*)

DPP v Brooks [1974] 2 All ER 840 (*refd*)

Abdullah Zawawi bin Yussof v PP [1993] 3 MLJ 9 (*dist*)

Ng Chai Kem v. P.P. [1994] 2 MLJ 211 (*refd*)

Public Prosecutor v. Mohamed Noor Jantan [1979] 2 MLJ 80 (*refd*)

Legislation referred to:

Dangerous Drugs Act 1952, ss. 2, 39 (A) (B), 37 (d)(da)

For the public prosecutor - Azamuddin bin Abdul Aziz (Sapini bin Mat Saman with him), DPPs

For the accused - S. Theivanthiran; M/s. Thevin Chandran & Wong

JUDGMENT

Kang Hwee Gee JC:

The accused was charged with the offence of trafficking in 274.04 grammes of ganja (cannabis) under s. 39(B) of the Dangerous Drugs Act 1952. The offence is punishable by death.

The case for the prosecution is as follows:

Acting on information received, Ketua Inspector Mohd. Zorki b. Saad of the Cawangan Anti Dadah (CAD), Ibu Pejabat Police Kontingent, Perak, decided to lay an ambush to arrest a suspected drug trafficker operating at the Ipoh Turf Club area. He summoned his men to a pre-operations briefing at the operations room of the CAD on 8 December 1991 at about 9 a.m. wherein they were briefed on the respective functions they were required to perform in the arrest. They then proceeded to the Turf Club compound half an hour later.

Basically the plan was to arrest the suspect at the compound of the Turf Club when he entered the area on a motorcycle. Inspector Zorki and Detective Segeant Major (DSM) Siadin positioned themselves at a place inside the compound just outside the gate leading into the parking area of the Turf Club. Another team consisting of Detective Lance Corporal (DLC) Selvarajah and Detective Lance Corporal (DLC) Manimaran were assigned to prevent the suspect's egress. Selvarajah was to ride his motorcycle with Manimaran as pillion to intercept the suspect upon being signalled to do so. They were positioned at one corner of the compound. Other personnel were stationed at other places around the area.

Half an hour later the accused entered the compound of the Turf Club riding motor cycle No. ABX 8598 and proceeded into the parking area *via* a gate. Laid on top of the petrol tank of his motor cycle between his thighs was a white laundry bag (Ex P15). The accused then made a U-turn and then proceeded to leave the parking area. As soon as he rode past the gate, Inspector Zorki came out of his ambush position. He raised his hands gesturing the

- a** accused to stop, shouting “polis!”. The accused ignored him and attempted to escape by increasing speed. He shouted “Tangkap!” which was the pre-arranged signal for the other personnel to act. At this juncture, as planned, DLC Selvarajah riding his motorcycle with DLC Manimaran as pillion came from the right colliding lightly into the centre portion of the accused motorcycle causing him to fall to his left. As he fell Inspector Zorki and Detective Sgt. Saidin rushed towards him. Inspector Zorki recovered the laundry bag which had fallen
- b** on to the ground with part of it still wedged in between his thighs. Inspector Zorki then proceeded to examine the bag. The top of the bag was filled up with 5 pieces of men's clothings consisting of 2 pairs of Malay dress and a jacket. Below the clothings was a white plastic bag (Ex. P8). Inside this white plastic bag was a yellow plastic bag. (Ex. P17).
- The yellow plastic bag contained 2 newspaper packages (Ex. P18(a) and (b)). Each of the packages contained 10 bundles of paper rolls [Ex. P18(a) 1-10 and Ex. P18(b) 1-10]. In each
- c** bundle there were 50 brown paper rolls making a total of 1,000 brown paper rolls in both the 2 packages. Each of the brown paper roll contained plant materials which Inspector Zorki suspected to be cannabis.
- The accused was arrested and brought back to Inspector Zorki's office at the CAD together with the exhibits, which he later marked before lodging a police report of the arrest. The
- d** accused and the exhibits were then handed over to the investigation officer ASP Osman who proceeded thereon to conduct investigations into the case.
- The plant materials in the 1000 paper rolls were later confirmed by the government chemist Tiang Tock Ching to be cannabis (ganja) with a total weight of 274.04 grammes after due analysis.
- e** *Finding at the close of the case for the prosecution:*
- After hearing submissions from both the defence and the prosecution I called the accused to enter his defence on the charge. I will now give my reasons:
- The prosecution's case was fairly straightforward and uncontradicted in that there was no reason at this stage why the evidence of Inspector Zorki should not be accepted as true
- f** and accurate. His evidence of the ambush leading to the recovery of the drugs was amply supported by the other members of the team who gave the same account, in particular DSM Saidin who was by his side during the incident and DLC Selvarajah who intercepted the accused when he allegedly attempted to speed off on his motorcycle. Both these witnesses corroborated Inspector Zorki's account of the incident with little variance. It was clear to me that the accused was in control and custody of the laundry bag as he was carrying it on his
- g** motorcycle and therefore the presumption under s. 37(d) of the Act would have to be invoked, that is to say, until the contrary is proved, the accused is presumed to be in possession and had knowledge of the ganja which was contained in that laundry bag.
- There was also no reason why the finding of the government chemist that the plant materials in the 1000 paper rolls were cannabis as defined in the Dangerous Drugs Act 1952 with a
- h** total weight of 274.04 grammes should not be accepted as true and accurate. I was satisfied that it did not suffer from the infirmities referred to in *Leong Boon Huat v. P.P.* [1993] 3 MLJ 11. He had been a chemist with the Chemistry Department since he joined the department in 1978 and had been analysing dangerous drugs ever since. In respect of this case he had performed both the quantitative and qualitative analysis to determine respectively, the weight and the nature of the drugs. With regard to the quantitative analysis he did not give a detailed account of how it was performed. However, his finding that the total weight of
- i** the plant materials in all the rolls was 274.04 grammes was not challenged by the defence

and I saw no reason why it should not be accepted as the drugs being cannabis, the process would only involve weighing the contents of the rolls. As for the qualitative analysis he started by conducting a visual examination of each of the 1,000 rolls of the drug which he had opened up. He found that all the plant materials bear the same botanical features of cannabis and they were wholly intact. He then examined the materials in each roll microscopically and found them to bear the familiar morphological features of cannabis with abundance of intact resins in its natural occurring droblular form. Next, he proceeded to mix all the contents of the 1,000 rolls from which he then took random samples from the mixture for the Dequinois Levine test and the Thin Layer Chromatography test which he conducted. Both these tests indicated the positive presence in all the samples, of cannaboid (the active ingredient found in cannabis resin) which confirmed that the resins were cannabis resins. As he had earlier found under microscopic examination that all the plant materials had abundance of intact resins, he therefore concluded that the plant materials were cannabis as defined under the Act (before the amendment by Act A834) under s. 2 as follows:

Cannabis means any part of any plant of the genus Cannabis from which the resin has not been extracted, by whatever name it may be designated;

He was cross-examined by defence Counsel on the detailed process he employed in conducting the Dequinois Levin test and the Thin Layer Chromatography test, but it was clear that on the authority of *Munusamy v. P.P.* [1987] 1 MLJ 496 unless there is any evidence from any other expert to the contrary, I would have to accept his finding at face value as true and accurate.

As the weight of the cannabis in this case was more than 200 grammes, it was clear the presumption under s. 37 (da) (vi) applied, that is to say, until the contrary is proved the accused must be presumed to be trafficking in the cannabis.

Further, under s.2 of the Act “trafficking” includes “conveying” and “carrying”. It was therefore clear trafficking had also been proved by virtue of this proviso, as the said drugs was being carried on his motorcycle. (See Supreme Court case of *Teh Geok Hock v. PP* [1989] 3 MLJ 162).

Upon a maximum evaluation of the evidence before me, I therefore found the prosecution’s case against the accused proved beyond reasonable doubt at this stage which if un rebutted would warrant his conviction, necessitating the calling of his defence on the charge as framed.

Defence:

The accused did not deny that the laundry bag was with him on the tank of his motorcycle when he was intercepted at the compound of the Turf Club. He was at the time of incident working as a riding boy at the Perak Turf Club and was staying away from his parents at a rented house No. 2 Sari 34 Taman Sri Chempaka, Ipoh, with 2 other Turf Club workers, Ramly and Pawi. He claimed that the white bag containing the ganja was given to him by his housemate Ramly, as he was leaving his own house to go to his father’s house which was situated in the compound of the Turf Club to launder his clothes.

Ramly wanted him to deliver the bag to a person called Suresh, a person whom he was also acquainted with and who was working as a gardener at the Turf Club. Since he was going the same way and to the same place, he obliged without enquiring as to what the plastic bag contain. Suresh was to be found at the store in the compound of the Club where the arrest was made. He put the white bag which Ramly gave him into his laundry bag. He placed the laundry bag on the petrol tank of his motorcycle and was on his way to deliver the bag to Suresh when he was intercepted by the police at the said compound. He had entered the

- a** compound and was proceeding to the store when not finding Suresh there, he decided to make a U-turn intending to proceed to his father's house. As he made the turn he saw an Indian man on a motorcycle alone in front of him riding towards him from his left. A Malay man whom he identified as Insp. Zorki was walking by his side. He slowed down his motorcycle intending to make way for the motorcyclist as he thought he was going to cut across him. Instead, the motorcycle collided into him causing him to fall to the right when the front
- b** tyre of the other motor cycle knocked onto his left leg. The other motorcyclist also fell. The laundry bag was thrown off his motor cycle. It was picked up by Inspector Zorki after he identified himself. He brought out the white bag which Ramly had given to him from the laundry bag. From the white bag he brought out another yellow plastic bag from which the said Inspector recovered the newspaper package containing the rolls of ganja. He claimed that he was then assaulted by an another male Malay from the group but Inspector Zorki
- c** intervened.

- He was handcuffed and brought to the police station where the contents of the laundry bag were laid out before him by Insp. Zorki and examined. Only then did he realise that the white bag that his housemate handed to him contained the drugs. He was then brought back to his father's house at No. 8, Race Course Quarters by the same group of personnel. But only
- d** a male Indian and a male Malay entered the house. They searched the house in spite of being informed by his father that he was not staying in that house. They did not find anything incriminating. Before bringing him back to the police station he claimed that they brought him to his house at No. 2, Sari 34, Taman Chempaka but did not enter it.

He denied knowing the plastic bag contained cannabis until Inspector Zorki showed them to him at the police station.

- e** A police process server Lance Corporal Jamaludin was called to give evidence that he attempted to serve a subpoena on the application of the accused to one Tamil Maran who was also known as Suresh at the Turf Club on 15 October 1994 at about 3.45 pm. He was informed by the club's security officer called Sundram that Suresh was no longer working there. Another police process server, Police Constable Rohani b. Mohd. Noor was also called
- f** to give evidence that on 22 October 1994 at about 6 pm he attempted to serve a subpoena on Ramly at No. 2 Sari 34, Taman Chempaka Ipoh (the address the accused claimed was his residence). He was informed by a neighbour that the house had been left vacant for a long time and that Ramly had moved to an address in Kampong Rapat Jaya Tambahan, Ipoh.

Finding at close of Defence:

- g** Before proceeding to consider the defence, I should perhaps refer to the Supreme Court case of *Mohd. Radhi Yaacob v. Public Prosecutor* [1991] 3 MLJ 169 for its guidance on the mechanics of evaluation of defence evidence in a charge under s. 39 B of the Dangerous Drugs Act 1952 where the presumptions under s. 37 (d) and s. 37(da) of the Act form the mainstay of the case for the prosecution. The principles are conveniently summarised in the headnotes as follows:

- h** (1) Even though a Judge does not accept or believe the accused's explanation, the accused must not be convicted until the Court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution's case.
- (2) Where the prosecution relies on available statutory presumptions to prove one or more of the essential ingredients of the charge, the particular burden of proof, as opposed to the general burden, shifts to the defence to rebut such presumptions on a balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable

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doubt but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt.

(3) Unless the evidence in a particular case does not obviously so warrant, it is incumbent for the Court to consider whether on balance of probability the defence has rebutted the statutory presumption of trafficking under s. 37 (da) of the Act as a separate exercise even though the Court is satisfied on balance that the presumption of possession under s. 37 (d) of the Act has not been rebutted. In this case the failure to do so was a material misdirection and was fatal to the conviction.

(4) The learned trial Judge acted on the wrong premise that once the appellant had failed to rebut the presumption under s. 37(d) of the Act, the presumption under s.37 (da) of the Act has also not been rebutted. On the facts of this particular case this error of law had occasioned a miscarriage of justice.

In *Public Prosecutor v. Badrulsham bin Bahrom* [1988] 2 MLJ 585 it was held that:

... in considering whether an accused person has sufficiently rebutted the presumption of possession of dangerous drugs which were found to be in his actual physical custody or under his control, it is legitimate for the Court to scrutinize the evidence as to what the accused said contemporaneously with the act or omission and also the surrounding circumstances under which the accused acted or failed to act.

I would agree with the learned Deputy Public Prosecutor who cited this passage in his submission that the same principle of assessment could be aptly applied to the present case. The Court he submitted, ought to take into consideration the following acts and circumstances which should amply indicate that the accused knew what he was carrying:

a) attempting to escape:

The prosecution's allegation of the attempt of the accused to escape after Inspector Zorki raised his hands to stop him could if true, indicate the accused's guilt with respect to the drugs he was carrying in the laundry bag. Although he denied making any such attempt, I have no doubt that Inspector Zorki was telling the truth. His evidence on this point was supported by both DSM Saidin and DLC Selvarajah both of whom testified to the same effect.

In the oft cited case of *DPP v Brooks* [1974] 2 All ER 840 the Privy Council hearing an appeal from Jamaica held that guilty knowledge could be inferred from the conduct of a driver who scrambled out and escaped from a motor van laden with a large amount of cannabis on the approach of police officers. This case was however distinguished on the facts by the Supreme Court in *Abdullah Zawawi bin Yusoff v PP* [1993] 3 MLJ 9 where the accused only ran off after the discovery of the drugs had been announced. It was held that his conduct was equally consistent with him being in a state of pure panic and therefore no inference of guilt should be drawn from it. In the present case, however, I am of the view that there was no reason for the accused to attempt to speed off as the most reasonable thing for him to do after Inspector Zorki ordered him to stop after having identified himself was to obey the order, there being no impending danger of any kind to himself. I would therefore agree with the learned deputy that his conduct under the circumstances betrayed his sense of guilt.

(b) the placement of the ganja in the laundry bag:

The fact that the plastic bag containing the ganja was found only at the bottom of the laundry bag, which the defence did not dispute, is not in my view consistent with the accused's claim that the bag was given to him by Ramly as he was going out. It is also not consistent with his claim that he was going to deliver the bag and its content to

- a* Suresh as he would have to remove the 5 pieces of clothing on top of the bag first before he could reach the bag containing the ganja at the bottom. I must therefore conclude that the placement of the drug under the circumstances is inconsistent with the accused's innocent conduct of receiving a package from a housemate for delivery to their common friend.
- b* (c) accepting Ramly's request to deliver to Suresh without asking any question:
It would appear from his own evidence that the accused readily accepted his housemate's request to deliver the plastic bag without so much as asking what it contained. While such omission to enquire may not appear to be regular in the ordinary course of human conduct, the probability that a person with an unconcerned disposition may not be bothered to ask is equally compelling, I therefore consider this point too petty to be of any significance and will not draw any conclusion from it.
- c* Assessing the accused's evidence in totality against the prosecution's case however, I am of the view that he had failed to rebut on balance the presumption of possession and knowledge under s. 37(d) of the Act. I must accordingly so find that he was in possession of the 274.04 grammes of ganja when he was arrested at the time and place mentioned in the charge.
- d* But, that is not the end of the matter as I must now proceed to the next step of evaluating the accused's defence in respect of the presumption of trafficking under s. 37(da) of the Act "as a separate exercise."
- In assessing the probabilities of the accused's evidence in this respect, it may be appropriate to recall the *dicta* of Wan Yahya SCJ in the recent Supreme Court case of *Ng Chai Kem v. P.P.* [1994] 2 MLJ 211 for its guidance on the duty of the Court to evaluate any evidence in rebuttal whatever its form and however trivial it may be:
- e* Where the prosecution invokes a statutory presumption to prove its case, a mere denial by the accused either made orally or by implication from evidence contrapositive to the presumed fact must necessarily be regarded as a refutation of the presumption by the defence. In such an event, the trial Judge is under a duty to re-examine the factual dispute, however trivial, affecting the presumed fact and come to a definite conclusion on the balance of probabilities.
- f* Failure to do so would tantamount to a serious denial of justice.
- This approach could not have been better chosen for its innovation in providing an accused with some form of safety valve in an otherwise inescapable pressure chamber of presumptions. It appears to convey the elements of the established principle enunciated in the former Federal Court case of *Public Prosecutor v. Mohamed Noor Jantan* [1979] 2 MLJ 80 that "where a burden is placed on an accused person to prove anything, by statute or common law, the burden is only a slight one."
- g* In the present case I must remind myself first and foremost, that the prosecution did not produce any evidence of how, where and from whom the cannabis was procured. In the absence of such antecedents, the substance required of the defence to rebut the presumption in my view should be very minimal indeed, as it would only be necessary to preponderate over what is at most, a statutory fiction.
- h* Although there was no other evidence other than the accused's own assertion that he was staying at No. 2, Sari 34 Taman Chempaka, in the face of the denial by both Inspector Zorki and DSM Saidin that they had brought him to that house after his arrest as he claimed, the fact that the house existed is irrefutable. This is clear from the evidence of the police process server P.C. Rohani who went there to attempt to serve the subpoena on Ramly. Further
- i* the accused's claim that he was sending his clothes to his father's house to be washed as

he usually did, is not improbable as it was established that clothes were actually found in the laundry bag he was carrying. It was also established (through both Inspector Zorki and DSM Saidin) that his father's house was situated in the compound of the Turf Club which made his claim all the more probable. The existence of Ramly and Suresh was also not improbable although none of them appeared to give evidence. That they did exist was established by the two respective police process servers who attempted to serve the subpoenas on them.

Viewed objectively and in totality I am satisfied and I so find that the accused has rebutted the presumption of trafficking and also succeeded in raising a reasonable doubt that he was trafficking, notwithstanding that he had not rebutted the presumption under s. 37(d) of the Act.

In the final analysis therefore, I am bound to hold that the accused should be acquitted of the charge of trafficking under s. 39B but found guilty under s. 39A (2) of the Act on account that he had not rebutted the presumption under s. 37(d) and in my judgment also failed to raise any reasonable doubt that he was in possession of the 274.04 grammes of ganja.

Sentence:

Public interest which stressed on deterrence should be the overriding consideration in all dangerous drugs cases where the drugs found on the accused is of such an amount that indicates he is not a user but a pusher or trafficker. It is only in cases where it is clear that he is a user, and therefore a victim, that the Court should consider a more lenient approach with the objective of rehabilitation in mind. In this case the accused was in possession of such a large amount of drugs (1,000 rolls of cannabis) that he was unlikely to be a mere user. I should therefore pay scant attention to Counsel's plea in mitigation on such personal grounds that the accused was a first offender, of young age and was remorseful of his action. The seriousness of the offence is reflected in the maximum sentence of life imprisonment and a minimum of 5 years and 10 strokes that could be imposed for possession of 50 grammes and above of cannabis under s. 39A(2)(f). Taking into consideration that the amount of cannabis in this case exceeded the 200 grammes limit which would put him in the category of presumed traffickers, the appropriate sentence to be effective, in my view, should be 15 years with 12 strokes to take effect from the date of arrest.

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